No. 84-363

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION AND BANK OF BOSTON CORPORATION

LAURENCE H. TRIBE
Counsel of Record
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
Counsel for Intervenor-Respondent Bank of New England Corporation

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Counsel for Intervenor-Respondent Hartford National Corporation

MARK A. WEISS
STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for Intervenor-Respondent Bank of Boston Corporation

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This brief is filed pursuant to Supreme Court Rule 35.5 in light of this Court's decision in *Metropolitan Life Ins. Co.* v. *Ward*, 53 U.S.L.W. 4399 (U.S. March 26, 1985), handed down after the filing of the private respondents' brief. Petitioners would use *Metropolitan Life* in a twelfth-hour attempt to

resurrect the equal protection claim that both the Federal Reserve Board and the Court of Appeals rejected and that petitioners abandoned when they elected not to raise it in their petition for certiorari.[1] This Court's prior decisions make clear that, even in light of the recent decision in *Metropolitan Life*, this is not a case in which the Court should exercise its discretion to entertain such a belated claim—whether to dispose of that claim here, or to invite the Second Circuit to reconsider the equal protection holding that it rendered upon an ample record and after plenary briefing and argument, on the basis of that court's conjecture as to the meaning of this Court's *Metropolitan Life* holding.[2] In any event, there is no

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1 As petitioners concede (Reply Br. 3), equal protection arguments were not presented in the Petition for Certiorari, nor were such issues addressed by petitioners in their principal Briefs on the Merits. Rule 21.1(a) of this Court's Rules provides that "[o]nly the questions set forth in the petition or fairly included therein will be considered." *See also* Rule 34.1(a). This rule will be disregarded, in Justice Powell's words, "only in the most exceptional cases." *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976). *See also White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 214 n.12 (1983).

2 A remand to the Court of Appeals for reconsideration of the abandoned equal protection issue would be the least appropriate disposition of this case, not only because this Court is in a better position to apply its *Metropolitan Life* reasoning to these facts, but also because the several interstate bank mergers challenged here have already been too long delayed. Sensitivity to the need for prompt resolution of this matter requires that the equal protection issue either be dismissed as not properly before the Court or resolved now. That the issue merits no further attention in this case is plain. Petitioners' assertion that *Metropolitan Life* sheds new light on the requirements of the Equal Protection Clause (Supp. Mem. 1, 4) ascribes a significance to that decision which this Court itself expressly eschewed: the Court repeatedly emphasized in *Metropolitan Life* that it was merely applying the teachings of *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981). See *Metropolitan Life Ins. Co.* v. *Ward*, 53 U.S.L.W. at 4401, 4402. Moreover, the Court in the past has not deemed it appropriate to do what petitioners now ask, even when an intervening decision has worked an indisputably substantial change in the law. *See, e.g.*, *United States* v. *Leon*, 104 S.Ct. 3405, 3412 (1984) (declining to address an issue decided below but not raised in the petition for certiorari, despite an intervening decision significantly altering the applicable law).

substantive merit to petitioners' equal protection argument in the circumstances of this case, which are entirely different from those in *Metropolitan Life*.

Metropolitan Life is wholly inapposite here because the exclusion complained of by petitioners was not imposed by any state. New York banking organizations are excluded from Massachusetts and Connecticut because of a *congressional* decision to adopt a national policy favoring local control of banking, and to pursue that policy by forbidding interstate bank acquisitions except to the degree that states determine to permit them. As demonstrated in our principal brief, Congress in the Douglas Amendment affirmatively determined that this repudiation of traditional norms favoring a unitary market was proper as a matter of national policy in the area of interstate bank acquisitions unless and except to the extent that states determine otherwise.[3]

Metropolitan Life, by contrast, did not involve any such affirmative congressional determination to favor provision of services by in-state companies. Neither the majority nor the dissenting opinion in *Metropolitan Life* leaves any doubt that Congress might, if it wished, have imposed measures operating to favor local companies. 53 U.S.L.W. at 4402 n.8 (opinion of the Court); *id.* at 4407 (O'Connor, J., dissenting). In fact, the majority made clear that *Metropolitan Life* would have been an entirely different case if affirmative congressional action had been involved. 53 U.S.L.W. at 4402 n.8.[4]

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3 There can be no doubt in the circumstances of this case that Congress adopted a policy in favor of balkanization of the national market. See Priv. Resp. Br. 11-27. *See also Town of Hallie* v. *City of Eau Claire*, 53 U.S.L.W. 4418, 4420 (U.S. March 27, 1985) (focusing upon the effects that "logically would result" from legislation granting "broad authority to regulate").

4 In *Metropolitan Life*, the Court found that Congress in the McCarran-Ferguson Act merely intended to restore to the states the power they possessed prior to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and that Congress had not approved any discriminatory action designed by states solely to favor in-state interests and disadvantage

When Congress adopts a policy in favor of local interests—as it unquestionably did in the Douglas Amendment—it is a *national* policy enacted by a *national* body. Such federal legislation simply *cannot* constitute "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent" 53 U.S.L.W. at 4401, because it is imposed not by one state against unrepresented outsiders, but by the national legislature where residents and outsiders are both represented. For this reason, the Commerce Clause grants Congress the power to enact legislation and programs that draw distinctions along regional or state lines or, without such explicit line-drawing, to regulate commerce in ways that produce equivalent effects.[5] This Court has previously sustained such explicit or implicit congressional line-drawing even in the face of charges that Congress' geographic discrimination violated the Due Process Clause of the fifth amendment.[6] As the Court stated in *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950), "Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions."

In fact, *Central Roig* presented the Court with a situation closely analogous to the present case. There, in an effort to rationalize "the mischievous fluctuations of a free sugar market," Congress had enacted legislation dividing the country into five sugar-producing areas. To each area the legislation allotted an annual quota of sugar, specifying the maximum

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out-of-state companies. *See* 53 U.S.L.W. at 4402 n.8. The dissenting opinion disagreed with this interpretation of Congress' intent, believing that the McCarran-Ferguson Act did authorize such discriminatory state taxation with respect to insurance. See 53 U.S.L.W. at 4402 n.8. (O'Connor, J., dissenting).

5 *Cf.*, *e.g.*, *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, 325-28 (1917) (Congress in exercise of its Commerce Clause power may permit individual states to restrict the movement of liquor from one state to another); *Kentucky Whip & Collar Co.* v. *Illinois Central R.R. Co.*, 299 U.S. 334, 351-52 (1937) (same with respect to interstate movement of convict-made goods).

6 *See*, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 331-33 (1981); *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939).

number of tons that might be marketed from that area.[7] After rejecting a Puerto Rico refining company's Commerce Clause challenge to the statute,[8] the Court proceeded to reject as well the company's claim that the discriminations built into the statute violated the fifth amendment's Due Process Clause:

> [I]t is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. *This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons.* This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.

338 U.S. at 617-18 (emphasis added). Thus, the Court in *Central Roig* concluded that it did not offend the fifth amendment for Congress to balkanize the national market so as to favor some areas over others. Indeed, the Court stressed that, if such claims of impermissible geographic discrimination in Congress' regulation of commerce had ever "carried plausibility," they were "belated in view of the unfolding of the Commerce Clause" in the Court's decisions. 338 U.S. at 617.[9]

Although the *Metropolitan Life* dissent expressed concern that the Court's decision could have far-reaching effects, all the Court purported to hold in that case was that, given a

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7 The quotas were anything but uniform; they were based on "past marketings" from each area, among other factors. 338 U.S. at 608.

8 The Court held that the Commerce Clause does not require geographic uniformity. 338 U.S. at 618.

9 The Court recently relied on *Central Roig* in holding that a claim of arbitrariness under the fifth amendment "cannot rest solely on a statute's lack of uniform geographic impact." *Hodel* v. *Indiana*, *supra*, 452 U.S. at 332. The *Hodel* Court also relied on *Currin* v. *Wallace*, *supra*, which similarly rejected a claim that a federal statute imposing geographic inequalities was impermissibly discriminatory under the fifth amendment's equal protection guarantee. It is therefore irrelevant that *Central Roig* was decided before *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

"state's natural inclination . . . to prefer domestic business over foreign," the "promotion of domestic business by discriminating against nonresident competitors is not a legitimate *state* purpose." 53 U.S.L.W. at 4402 (emphasis added).[10] In the case at hand, it is Congress itself, *not* any state or states, that has created a regime explicitly favoring local control and local interests. And the Douglas Amendment, unlike the Alabama law in *Metropolitan Life*, was designed *not* to give a parochial and self-interested advantage to the enacting jurisdiction's own residents at the expense of outsiders, but to keep control of credit diffused and responsive to community needs—precisely the kind of principled and neutral purpose Congress is manifestly empowered under the Commerce Clause to pursue by such means, including delegation to state legislatures, as it deems wise.[11]

In short, this case does not even resemble one in which Congress has sought to empower the states to violate the Equal Protection Clause. *Cf. Shapiro* v. *Thompson*, 394 U.S. 618, 641 (1969) (*discussed in* Supp. Mem. 3). Rather, Congress itself consciously adopted a policy in favor of local control—action that clearly does *not* violate equal protection principles—and imposed, as a matter of federal law, the exclusionary barrier that forms the heart of petitioners' complaint.[12] The Massachusetts and Connecticut Acts serve merely to lift that exclusionary federal barrier to a degree, as Congress expressly permitted. Thus, the continued exclusion from Massachusetts and Connecticut of some out-of-state banking organizations is the result not of any state action but of what Congress itself did in the Douglas Amendment.[13] In these circumstances, *Metropolitan Life* is wholly inapposite.

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10 The Court repeatedly emphasized the narrowness of its holding. *Id.* at 4400, 4401, 4402 n.10.

11 See Priv. Resp. Br. 14-16.

12 See Priv. Resp. Br. 11-16.

13 Even if such exclusion were viewed as the result of the states' actions, it is the sort of exclusion that Congress itself clearly could have

Even if this case were deemed to involve a form of state-imposed discrimination, there is no basis for any finding that the Massachusetts and Connecticut Acts violate the Equal Protection Clause.

In *Metropolitan Life*, the Court held that Alabama's domestic preference tax "erected barriers to foreign companies" that wished to do business in the state. In the Court's view, the Alabama tax gave "the 'home team' an advantage by burdening *all* foreign corporations seeking to do business within the State . . . ." 53 U.S.L.W. at 4401 (emphasis in original). In stark contrast, the Massachusetts and Connecticut Acts plainly do not erect any new barrier or impose any new burden with respect to out-of-state companies; instead, they partially lift the barrier to interstate acquisitions imposed by the Douglas Amendment and thereby *expose* "home team" banking organizations for the first time to competition on equal terms from some out-of-state bank holding companies.[14]

To be sure, the Massachusetts and Connecticut Acts could be said to favor one group of outsiders over another, but that is true of much state legislation, including state statutes under the Douglas Amendment that are based on "grandfather" status or that impose reciprocity requirements.[15] Nowhere in *Metropoli-*

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effected directly under its Commerce Clause power without violating equal protection norms. Thus there likewise is no equal protection violation where states, pursuant to the express congressional grant of authority contained in the Douglas Amendment, have undertaken such action. *See* Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387, 400-01, 412 & n.114 (1983).

14 Thus, the commerce that Connecticut and Massachusetts are supposed to have "burdened" is interstate commerce in bank acquisitions that would not have existed *at all* if those states had not lifted the pre-existing federal barrier. *See Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 815 (1976) (Stevens, J., concurring) ("It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to [state legislation]").

15 See Priv. Resp. Br. 23 & n.69.

tan Life did the Court condemn this form of legislative classification as impermissible under the Equal Protection Clause. Rather, this Court held invalid only a purpose that it deemed "purely and *completely* discriminatory"—a design "*only* to favor domestic industry within the state. . . ." 53 U.S.L.W. at 4401 (emphasis added).[16]

As both the Federal Reserve Board and the Court of Appeals determined, Massachusetts and Connecticut had legitimate reasons for deciding to remove the Douglas Amendment's general ban on interstate bank acquisitions for some but not all out-of-state banking organizations. The Board found the Acts "rationally related to . . . the purposes of . . . avoiding an undue concentration of resources, maintaining the responsiveness of the banking system to local credit needs and providing an opportunity for a limited interstate banking experiment." Pet. App. A54, A75. The Court of Appeals similarly concluded that the Acts' regional approach to interstate bank acquisitions was "designed to foster banking and related activities" in New England and evinced a concern that allowing unlimited interstate acquisitions would permit large, money-center institutions to dominate banking activity to the detriment of local communities and their credit needs. Pet. App. A33.[17] Petitioners do not suggest, nor could it be argued, that

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16 Thus, the Equal Protection Clause's traditional concern—that unrepresented interests not suffer at the hands of a state legislature—is inapplicable here: the Massachusetts and Connecticut Acts do not favor residents *over* non-residents but instead distinguish *among* non-residents. See Priv. Resp. Br. 24 n.73. *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976). It is therefore especially noteworthy that this Court in *Western & Southern, supra*, expressly upheld over equal protection attack state legislation discriminating among non-residents based on their state of residence while invalidating in *Metropolitan Life* a decision to favor residents over non-residents.

17 This Court itself has previously endorsed the propriety and importance of maintaining a financial system responsive to community needs. *See Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). *See also Edgar* v. *MITE Corp.*, 457 U.S. 624, 646 (1982) (Powell, J., concurring in part) (noting state's legitimate interest in protecting—on behalf of local communities—regionally based institutions from acquisition by larger, out-of-state corporations).

these findings and conclusions are insufficiently supported by the record below.[18]

The Massachusetts and Connecticut Acts involve legitimate state experiments with interstate banking.[19] These states have sought "to assess the impact of out-of-state entry" through a limited exception to the Douglas Amendment's general prohibition.[20] It was certainly foreseeable when the Douglas Amendment was passed that such an experiment might operate on a regional basis and exclude bank holding companies based in money centers such as New York: the "legislative and economic realities" (Reply Br. 1, 3) of 1956 included Senator Douglas' undisguised alarm at the growing power of such financial giants as Citibank—predecessor and chief subsidiary of petitioner Citicorp—and *amicus* Chase Manhattan.[21] In their experiments, Connecticut and Massachusetts pursue no parochial program of domestic protectionism, but labor to create a regional banking system strong enough to weather the coming storm of full interstate banking, yet responsive to the needs of local communities.[22]

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18 *See* JA (2d Cir.) 1208-19, 1402-07, 2153-56, 2184-2215.

19 *Cf. Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. at 817 (Stevens, J., concurring) (Commerce Clause does not bar state "experiment[ation] with different methods of encouraging local enterprise without providing like encouragement to out-of-state competitors").

20 See Priv. Resp. Br. 37.

21 See Pet. App. A12-15.

22 See Priv. Resp. Br. 35-36 & nn.105-106, 109-10. The aim of both the Douglas Amendment (Priv. Resp. Br. 14-16) and the challenged Acts (*id.* at 35-36 & nn.105-06, 38) to preserve some degree of local control over credit has absolutely nothing in common with the "encouragement of capital investment in the Alabama assets and governmental securities specified in the statute" struck down in *Metropolitan Life*, 53 U.S.L.W. at 4402. The Acts challenged here do not seek to compel foreign investment in local assets and state securities by the carrot-and-stick application of a discriminatory tax; they seek, rather, to maintain an indigenous, locally-controlled financial system capable of meeting local needs precisely so that resident businesses and consumers will *not* have to face the burden of attracting out-of-state credit and capital.

Indeed, the Connecticut and Massachusetts Acts unquestionably effectuate congressional policy rather than merely advance parochial state interests: the Acts seek the very ends Congress endorsed in the Douglas Amendment.[23] For, in empowering the states to lift the federal barrier to interstate acquisitions as they saw fit, Congress sought to avoid "undue concentration of banking and financial power" [24] and to prevent "the big holding companies" from "keep[ing] far ahead of the rest of the pack" in "unequal races." [25] The challenged Acts pursue these precise goals. See Priv. Resp. Br. Part II.[26] Even if they did so pursuant to a federal statutory authorization that did not "expressly state" in its text or "its legislative history that it intends for the delegated action to have anticompetitive effects," *Town of Hallie* v. *City of Eau Claire*, 53 U.S.L.W. 4418, 4421 (U.S. March 27, 1985), that omission would be as immaterial here as it was in *Town of Hallie*. In that case, which was decided after respondents' briefs on the

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23 Petitioners' sudden injection of this Court's twenty-first amendment decision in *Bacchus Imports, Ltd.* v. *Dias*, 104 S.Ct. 3049 (1984), is thus doubly beside the point—not only because that Amendment is far afield from the problem posed here, but also because *Bacchus Imports* rested on the proposition that the twenty-first amendment's concerns about state temperance policy bore no relation to the challenged statute's admitted purpose of "favor[ing] local liquor industries by erecting barriers to competition," *id.* at 3058. Moreover, in *Bacchus Imports*, this Court had to reconcile the Commerce Clause and the twenty-first amendment; the present case requires no such judicial reconciliation, for Congress displaced the norms of the dormant Commerce Clause when it enacted the Douglas Amendment. See Priv. Resp. Br. 11-39.

24 See Priv. Resp. Br. 15 & n.40.

25 See Priv. Resp. Br. 16 n.42.

26 Petitioners' contention that those concerns should be guarded solely by the Federal Reserve Board when it reviews proposed acquisitions (Reply Br. 17-18) ignores the fact that in 1956 Congress rejected a Senate Committee proposal that would have adopted just such a policy (see Priv. Resp. Br. 17) and opted instead to suppress interstate commerce in acquisitions while authorizing the states to lift that federal burden. Petitioners thereby attempt to re-fight a legislative battle that they lost nearly three decades ago.

merits were submitted, this Court unanimously declared that any demand for the very sort of specificity that petitioners would require in this case "embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind." *Id.*[27]

In sum, *Metropolitan Life*, which involved a hypothesized state purpose unconnected to any national policy—the purpose of favoring in-state companies "at the expense of" non-residents, 53 U.S.L.W. at 4402 n.10—cannot be mechanically extended to the entirely different context of this case. For here states have *opened* their borders to increased out-of-state competition; and they have done so while drawing lines that reasonably reflect the very considerations Congress itself weighed when it delegated to the states the discretion to decide how much additional competition to invite. In the framework of a federal statute designed to permit states to calibrate "the degree" of additional competition (Priv. Resp. Br. 18), the line drawn by Connecticut and Massachusetts is surely a rational one. For a court to condemn it as impermissible would transform *Metropolitan Life* into a veritable engine of destruction for economic regulation.

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27 The *Hallie* test is whether the Acts are a "foreseeable result of empowering," *id.* at 4420, the states to control bank acquisitions within their borders. Despite petitioners' remarkable notion that Congress in 1956 had heard not "a word of discussion on the subject" (Reply Br. 5), the fact is that Congress in that year had heard testimony by bank officials advocating a federally-mandated regional approach to bank acquisitions (see Priv. Resp. Br. 21 & nn.60 & 64), and had determined instead to leave the choice between that approach and others to state "discretion" (see Priv. Resp. Br. 20 & n.59), without in any way qualifying the breadth of its delegation to the states or negating the "foreseeable" and "logical[]" (*Town of Hallie*, 53 U.S.L.W. at 4420) results of that delegation—state-structured regional experimentation.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
Griswold Hall 307
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

Of Counsel:

WILMOT T. POPE
CHOATE, HALL & STEWART
60 State Street
Boston, Massachusetts 02109
Counsel for Intervenor-Respondent Bank of New England Corporation

BERTRAM M. KANTOR
MICHAEL H. BYOWITZ
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10171
Counsel for Intervenor-Respondent CBT Corporation

DOUGLAS M. KRAUS
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Counsel for Intervenor-Respondent Hartford National Corporation

MARK A. WEISS
STUART C. STOCK
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for Intervenor-Respondent Bank of Boston Corporation

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